

2005

Big Sky Finance Company, a Utah corporation v.
Avis and Archibald Title Insurance Agency, limited
company, Lawyers Title Insurance Corporation, a
Virginia corporation doing business in the State of
Utah, Fireman's Fund Insurance Company, a
California corporation doing business in the State
of Utah, et al. : Brief of Appellee

Utah Court of Appeals

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2005

IN THE COURT OF APPEALS IN AND FOR THE STATE OF UTAH

BIG SKY FINANCE COMPANY, a Utah)
corporation,)

Plaintiff/Appellant,)

vs.)

AVIS AND ARCHIBALD TITLE)
INSURANCE AGENCY, limited company,)

LAWYERS TITLE INSURANCE)
CORPORATION, a Virginia corporation)

doing business in the State of Utah,)

FIREMAN'S FUND INSURANCE)

COMPANY, a California corporation)

doing business in the State of Utah, et al.)

Defendants/Appellees.)

**BRIEF OF APPELLEE
FIREMAN'S FUND**

Case No. 20050313-CA

**APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF
WEBER COUNTY, STATE OF UTAH
HONORABLE W. BRENT WEST**

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**FILED
UTAH APPELLATE COURTS**

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED ⁵2005

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JURISDICTION

This case is before the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(3)(j) and pursuant to the summary judgment entered as a final judgment by the trial court. The appeal was referred to the Utah Court of Appeals under Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES ON APPEAL

Pursuant to Rule 24 of the Utah Rules of Appellate Procedure, Appellee Fireman's Fund Insurance Company ("Fireman's Fund") is dissatisfied with Appellant Big Sky Finance Company's ("Big Sky") statement of issues on appeal. As such, Fireman's Fund submits the following as a correct statement of the issues on appeal:

1. Did the district court err in granting Fireman's Fund's uncontested Motion for Summary Judgment and determining that the only claim Big Sky raised against Fireman's Fund was one for fraudulent nondisclosure - a claim the district court concluded was factually and legally without merit?

2. Did the trial court abuse its discretion in denying Big Sky's Motion for Leave to File a Second Amended Complaint?

STANDARDS OF REVIEW

1. An appellate court reviews the trial court's grant of summary judgment for correctness, affording no special deference to the trial court's legal conclusions. See Girbich v. Numed, Inc., 977 P.2d 1205 (Utah 1999). The reviewing court may affirm a grant of summary judgment on any ground available to the trial court,

even if it is not relied on below. See Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993).

2. The decision to grant a party leave to amend is left to the sound discretion of the district court. See e.g., Aurora Credit Servs., Inc. v. Liberty West Dev., Inc., 970 P.2d 1273, 1281 (Utah 1998); Westley v. Farmer's Ins. Exch., 663 P.2d 93, 94 (Utah 1983). A district court's decision regarding leave to amend will not be disturbed absent an abuse of discretion resulting in prejudice to the complaining party. See Norman v. Arnold, 2002 UT 81, P38.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

In November 1997, Big Sky filed suit against Avis and Archibald Title Insurance ("Avis and Archibald") for violating escrow instructions relating to a real estate investment between Big Sky and an individual by the name of Wayne Ogden.

In April 2002, Big Sky filed an Amended Complaint seeking to recover damages from Avis and Archibald's insurance companies, Lawyer's Title and Fireman's Fund. Big Sky's Amended Complaint alleged that Fireman's Fund fraudulently failed to disclose the existence of an insurance policy that it alleges would have provided liability coverage for the claims Big Sky had asserted against Avis and Archibald. In response to a motion for summary judgment filed by Lawyer's Title, Big Sky sought leave to file a Second Amended Complaint to add additional causes of action. The trial court denied Big Sky's Motion for Leave to Amend and granted Lawyer's Title's Motion for Summary

Judgment.

Later, Fireman's Fund moved for summary judgment in its own right. Big Sky made no effort whatsoever in opposing Fireman's Fund's Motion for Summary Judgment, and on August 9, 2004, the trial court granted Fireman's Fund's Motion finding it to be meritorious. Despite having filed no opposition to Fireman's Fund's Motion, Big Sky now appeals the trial court's ruling.

B. COURSE OF PROCEEDINGS.

Big Sky filed its original Complaint on November 17, 1997. (R. 001.) More than four years later, on April 2, 2002, Big Sky filed an Amended Complaint, naming Fireman's Fund as an additional defendant. (R. 174.) On June 11, 2004, Fireman's Fund filed its Motion for Summary Judgment. (R. 452.) After Big Sky made no effort to oppose Fireman's Fund's Motion, on August 9, 2004, the trial court granted the same. (R. 589.) On September 10, 2004, the trial court signed an order granting Fireman's Fund's Motion. (R. 592.) On March 22, 2005, the trial court entered an order making its September 10, 2004 Order on Fireman's Fund's Motion for Summary Judgment final and appealable under Rule 54(b). (R. 694.) On March 29, 2005, Big Sky filed a notice of appeal regarding the trial court's March 22, 2005 Order. (R. 674.)

C. DISPOSITION OF THE COURT.

The trial court granted Fireman's Fund's uncontested Motion for Summary Judgment on August 9, 2004, dismissing Big Sky's claim as a matter of law. (R. 589.)

STATEMENT OF FACTS

The following facts are taken in large part from Defendant Fireman's Fund's Memorandum in Support of Motion for Summary Judgment. Because Big Sky failed to oppose Fireman's Fund's Motion, these facts are deemed admitted pursuant to Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

I. The Big Sky Lawsuit.

1. On November 14, 1997, Big Sky filed suit against Avis and Archibald Title Insurance Company, and its escrow agent, Jayson Cherry, for violating escrow instructions concerning the disbursement of certain funds relating to a real estate investment between Big Sky and an individual by the name of Wayne Ogden. Avis and Archibald was represented by its private attorneys Nalder & Stratford during this time. (See generally, R. 456-58; R. 459, ¶ 19.)

2. On February 13, 1998, Big Sky served a set of discovery requests on Avis and Archibald seeking certain documents relevant to its claim. (R. 459, ¶ 20.)

3. On April 2, 1998, Avis and Archibald responded to Big Sky's discovery requests by producing a copy of the policy and Declarations Sheet from Avis and Archibald's Professional Liability Policy with Fireman's Fund as well as contact information for Fireman's Fund. (R. 459-60, ¶ 21.)

4. On April 8, 1999, apparently not recognizing the production of the same information a year beforehand, counsel for Big Sky again inquired as to the identity of Avis and Archibald's insurance company. (R. 460, ¶22.)

5. On April 12, 1999, counsel for Avis and Archibald again produced a copy of the Fireman's Fund policy, Declarations Sheet and contact information, and indicated that this information had been produced a year earlier. (R. 460, ¶23.)

6. On April 26, 1999, Avis and Archibald informed Fireman's Fund for the first time of the lawsuit filed by Big Sky. This letter was copied to Big Sky, and again included the contact information and policy number for Avis and Archibald's policy with Fireman's Fund. (R. 460, ¶24.)

7. On June 10, 1999, Fireman's Fund (a/k/a Interstate) acknowledged receipt of Avis and Archibald's April 26, 1999 notice of claim, indicating that it was the first notice it had received of the Big Sky lawsuit. Fireman's Fund also indicated that there were coverage issues that would have to be determined. (R. 460, ¶25.)

8. On January 16, 2002, the trial court granted a motion by Big Sky for leave to file an amended complaint. (R. 461, ¶27.) Big Sky's Amended Complaint added Fireman's Fund as a defendant, claiming fraudulent non-disclosure of the existence of a policy of insurance. Big Sky claimed that Fireman's Fund had somehow attempted to conceal the fact that it had issued a professional liability policy to Avis and Archibald. (R. 461, ¶28.)

9. Big Sky's Amended Complaint also added Lawyer's Title Insurance Corporation ("Lawyer's Title") as a defendant, also claiming fraudulent non-disclosure of the existence of a policy of insurance. (R. 181.)

II. Lawyer's Title's Motion for Summary Judgment and Big Sky's Motion to File Second Amended Complaint.

10. On July 22, 2003, Lawyer's Title moved for summary judgment, arguing that Big Sky's claim for fraudulent nondisclosure failed as a matter of law. (R. 204.) In substance, Lawyer's Title argued that, while it had no duty to do so, the undisputed evidence showed that Lawyer's Title had in fact disclosed all of the information Big Sky requested regarding the existence of an insurance policy that had been issued to Lawyer's Title. (R. 210-11.) Accordingly, Lawyer's Title argued there was no basis for Big Sky's claim. (R. 211.)

11. On July 31, 2003, Big Sky responded to Lawyer's Title's Motion and made a cross motion for summary judgment. (R. 334.) In addition, on or about September 18, 2003, now several years after Big Sky filed its original Complaint, Big Sky moved for leave to file a Second Amended Complaint. (R. 313.)

12. In its supporting memorandum, Big Sky argued that it needed to amend its complaint and add specific causes of action to allege that Lawyers Title "is liable for the acts of its agent [Avis and Archibald], as detailed in the Utah statutory law and the general common law of agent/principal or respondeat superior." (R. 314.)

13. Accompanying Big Sky's Motion for Leave to Amend was a copy of Big Sky's (Proposed) Second Amended Complaint, which added an Eighth Cause of Action. (R. 317.) Big Sky's Eighth Cause of Action purports to allege claims against Lawyer's Title for statutory liability under Utah Code Ann. § 31A-23-308, vicarious

liability under respondeat superior, and against Fireman's Fund and Lawyer's Title for insurer liability for breach of the covenant of good faith and fair dealing. (R. 325-26.)¹

14. Lawyer's Title filed a memorandum opposing Big Sky's motion to amend, and Fireman's Fund formally joined in the same. (R. 384; R. 411, respectively.)

15. After briefing was completed and oral argument heard, the trial court ruled on the various motions. Among other things, the trial court determined that Big Sky's Amended Complaint asserted a single cause of action for fraudulent nondisclosure. (R. 573.) The trial court found that based on the undisputed facts, Big Sky's nondisclosure claim against Lawyer's Title failed as a matter of law, and therefore, Lawyer's Title's Motion for Summary Judgment should be granted. (R. 573-74.) The trial court also determined that Big Sky's Motion to Amend should be denied based on considerations of untimeliness, no justification for delay, and prejudice. (R. 575.)

III. Fireman's Fund's Motion for Summary Judgment.

16. On June 11, 2004, Fireman's Fund filed its Motion for Summary Judgment. (R. 452.) Similar to Lawyer's Title, in its supporting memorandum, Fireman's Fund argued that Big Sky's claim for fraudulent nondisclosure failed as a matter of law. (R. 462.)

¹ For reasons described later in this brief, it is important to note that the only claim set forth in the Eighth Cause of Action that is directed at Fireman's Fund is for breach of the implied covenant of good faith and fair dealing.

17. Fireman's Fund explained that, while it had no duty to do so, it too had previously provided Big Sky with a copy of the Fireman's Fund policy and, as such, Big Sky's claim for fraudulent nondisclosure of the insurance policy lacked merit. (R. 465-66.)

18. Fireman's Fund also argued that Big Sky's claim for fraudulent nondisclosure should be dismissed based on the expiration of the three-year statute of limitations Utah law imposes on any action for fraud. (R. 466-68.)

19. Big Sky made absolutely no effort to oppose Fireman's Fund's Motion for Summary Judgment. (Brief of Appellant, Fact No. 47.)

20. In a decision dated August 9, 2004, the trial court noted that Fireman's Fund's Motion was uncontested, but granted the same finding it to be meritorious. (R. 589.)

21. On September 10, 2004, the trial court signed an order granting Fireman's Fund's Motion and making the following findings:

The Court finds that plaintiff Big Sky is unable to show that Fireman's Fund owed it a duty to disclose under the undisputed facts of this case as Big Sky shared no contractual, fiduciary or confidential relationship with Fireman's Fund. In addition, the Court finds that Big Sky's claim for fraudulent non-disclosure lacks factual merit as a copy of Avis & Archibald's insurance policy with Fireman's Fund was in fact disclosed to Big Sky no later than April of 1998. Finally, the Court finds that Big Sky has failed to bring its fraudulent non-disclosure claim within the applicable statute of limitations.

(R. 593.)

22. On March 22, 2005, the trial court entered an order making its September 10, 2004 Order on Fireman's Fund's Motion for Summary Judgment and its July 8, 2004 Order on Lawyer's Title's Motion for Summary Judgment final and appealable under Rule 54(b). (R. 694.)

SUMMARY OF ARGUMENT

Big Sky has filed the instant appeal asking that this Court reverse the trial court's ruling on Fireman's Fund's Motion for Summary Judgment. Even though Big Sky made no effort to oppose Fireman's Fund's Motion at the trial court level, Big Sky argues that the trial court's ruling should be reversed.

It has long been held in Utah that, as a general rule, appellate courts will not consider issues raised for the first time on appeal. By failing to oppose Fireman's Fund's Motion for Summary Judgment, each issue raised by Big Sky respecting the trial court's ruling on Fireman's Fund's Motion is an issue raised for the first time on appeal. Because Big Sky has presented no reasonable justification for its failure to preserve issues for appeal, Fireman's Fund should be dismissed from this appeal.

In addition, the facts of this case demonstrate that, even if Big Sky had preserved issues for appeal, the trial court's decision granting Fireman's Fund's Motion for Summary Judgment was correct in all respects. As a result, Fireman's Fund requests that the decision of the trial court be affirmed.

ARGUMENT

I. BIG SKY DID NOT OPPOSE FIREMAN'S FUND'S MOTION FOR SUMMARY JUDGMENT AND THEREFORE FAILED TO PRESERVE ANY ISSUES FOR APPEAL.

Big Sky's appeal from the trial court's decision on Defendant Fireman's Fund's Motion for Summary Judgment is fatally flawed and should be dismissed.

On June 11, 2004, Fireman's Fund moved for summary judgment. (R. 452.) Big Sky's Amended Complaint alleged a single cause of action - fraudulent non-disclosure. Fireman's Fund moved for summary judgment on the basis that it owed no duty to disclose to Big Sky, a third party claimant, the existence of the insurance policy. (R. 463.) Furthermore, Big Sky's claim completely lacked merit as the undisputed facts clearly showed that a copy of the insurance policy had been disclosed to Big Sky from the outset of its litigation with the insured, Avis and Archibald. (R. 465.) In addition, Big Sky's claim for fraudulent non-disclosure was barred by the applicable statute of limitations. (R. 466.)

Under Utah law, when a motion for summary judgment is made and properly supported, the adverse party must respond in order to oppose the motion. See e.g., Rule 56, Utah R. Civ. P. ("an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.") "Summary judgment, if appropriate, shall be entered against a party failing to file such a response." See id.

In this case, Big Sky made absolutely no effort to oppose Fireman's Fund's Motion for Summary Judgment. Big Sky filed no opposition memorandum, no affidavit, no motion for a Rule 56(f) continuance, nothing. Fireman's Fund's Motion was completely uncontested. On August 9, 2004, the trial court granted Fireman's Fund's Motion, finding the uncontested motion to be meritorious. (R. 589.) On September 10, 2004, the trial court entered an order regarding Fireman's Fund's Motion, which stated, in relevant part:

The Court finds that plaintiff Big Sky is unable to show that Fireman's Fund owed it a duty to disclose under the undisputed facts of this case as Big Sky shared no contractual, fiduciary or confidential relationship with Fireman's Fund. In addition, the Court finds that Big Sky's claim for fraudulent non-disclosure lacks factual merit as a copy of Avis & Archibald's insurance policy with Fireman's Fund was in fact disclosed to Big Sky no later than April of 1998. Finally, the Court finds that Big Sky has failed to bring its fraudulent non-disclosure claim within the applicable statute of limitations.

(R. 593.) On March 22, 2005, the trial court entered an order making its September 10, 2004 Order on Fireman's Fund's Motion for Summary Judgment final and appealable under Rule 54(b). (R. 694.)

Despite having made absolutely no effort to oppose Fireman's Fund's Motion at the trial court level, Big Sky has filed the instant appeal asking that this Court reverse the trial court's ruling. In so doing, Big Sky attempts to raise issues that have not been preserved and that have been raised for the first time on appeal.

In Utah, it is well settled that appellate courts will not address issues raised for

the first time on appeal. See Smith v. Four Corners Mental Health Ctr., 2003 UT 23, P19 (refusing to address any new arguments raised for the first time on appeal.); Healthcare Services Group v. Utah Department of Health, 2002 UT 5 (declining to reach the merits of new arguments raised for the first time on appeal); Carrier v. Salt Lake County, 2004 UT 98, P43. The only recognized exceptions to this rule arise when “exceptional circumstances” or plain error are demonstrated. See e.g., Pugh v. Draper City, 2005 UT 12, P18; Walter v. Stewart, 2003 UT App 86, P33, cert. denied, 73 P.3d 946 (Utah 2003); State v. Mabe, 864 P.2d 890, 893 n.6 (Utah 1993) (“Absent exceptional circumstances, this court will not consider issues raised for the first time on appeal.”) “This rule is based, in part, on the principle that it is unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.” Ellis v. Swensen, 2000 UT 101, P30.

In this case, Big Sky has not argued plain error, nor has it made any attempt to demonstrate that “exceptional circumstances” caused its failure to oppose Fireman’s Fund’s Motion. Instead, Big Sky attempts to justify its failure to oppose Fireman’s Fund’s Motion by arguing that the trial court had “already made its position clear” when it ruled on Lawyer’s Title’s Motion for Summary Judgment. (Appellant’s Memorandum in Opposition to Fireman’s Fund’s Motion for Summary Disposition, p. 14.) In fact, Big Sky goes so far as to argue that, based on the trial court’s decision on Lawyer’s Title’s Motion for Summary Judgment, it chose not to oppose Fireman’s Fund’s Motion for reasons of “judicial economy.” (See id., at p. 13.) As demonstrated below, Big Sky’s

justification for failing to oppose Fireman's Fund's Motion is both illogical and disingenuous.

First, Fireman's Fund and Lawyer's Title are two separate entities whose rights to summary judgment were determined separately and independently from one another. Fireman's Fund and Lawyer's Title moved for summary judgment at different times and in different motions. While the issues raised in Lawyer's Title's and Fireman's Fund's motions involved similar issues, the trial court found that Fireman's Fund was entitled to summary judgment in its own right. Moreover, the facts underlying Fireman's Fund's Motion, particularly those concerning the disclosure of the Fireman's Fund policy, are entirely distinct from the facts underlying Lawyer's Title's Motion. Simply put, Fireman's Fund's Motion for Summary Judgment was a separate motion which Big Sky had a duty to oppose. When Big Sky chose to do nothing, the trial court considered the motion uncontested and, after finding it to be meritorious, granted the same.

Second, Big Sky's attempt to bootstrap arguments raised in opposing Lawyer's Title's Motion in an effort to demonstrate that it preserved issues on appeal reveals profound inconsistencies. On the one hand, Big Sky suggests that it did not respond to Fireman's Fund's Motion for Summary Judgment "because the trial court had already made its position clear" when it granted Lawyer's Title's Motion for Summary Judgment and denied Big Sky's Motion for Leave to Amend. (Appellant's Memorandum in Opposition to Fireman's Fund's Motion for Summary Disposition, p. 14.) However, at the same time, Big Sky challenges the applicability of the trial court's decision to deny

Big Sky's Motion to Amend with respect to Fireman's Fund, arguing that the trial court did not make "specific factual findings of untimeliness, unjustifiable delay, or prejudice as to Fireman's Fund." (Appellant's Brief, p. 26.) Big Sky cannot have it both ways.

If Big Sky truly believed that the trial court's decision denying Big Sky's Motion to Amend was improper or inapplicable as to Fireman's Fund, Big Sky had an obligation to raise these arguments in response to Fireman's Fund's Motion for Summary Judgment. Big Sky however chose to forego presenting these arguments to the trial court, and instead presents these arguments for the first time on appeal.

Third, the trial court made it clear at the hearing on Lawyer's Title's Motion that its ruling did not dispose of Big Sky's claims against Fireman's Fund. After ruling on Lawyer's Title's Motion, the trial court took the opportunity to say a few words regarding Fireman's Fund. The trial court stated:

THE COURT: All right. Now, I just wanna address Fireman's Fund. Yes, you were bandied around in the pleadings from both sides, but you're not before me on anything, Mr. Belnap, so you'll have to wait until the dust sorts and see what - - how this impacts your client's position. ***But you and Mr. Durbano get to live to fight another day. Okay?***

(R. 720, p. 25-26.) (Emphasis added.) The above-excerpt from the hearing on Lawyer's Title's Motion for Summary Judgment shows that, despite Big Sky's insinuation to the contrary, the trial court in no way disposed of Big Sky's claims against Fireman's Fund when it ruled on Lawyer's Title's Motion. Rather, it shows that, with respect to Fireman's Fund, there were still issues left open and to be determined. Fireman's Fund's

filed its Motion for Summary Judgment so that those issues could be determined. Big Sky had an opportunity and duty to respond and oppose Fireman's Fund's Motion, but decided instead to do nothing.

Fourth, Big Sky's justification for failing to oppose Fireman's Fund's Motion for Summary Judgment, if accepted, would create poor judicial precedent. In an effort to rationalize its failure to respond to Fireman's Fund's Motion, Big Sky argues:

any response . . . would have been like the remaining Sioux Indians at Wounded Knee mounting another excuse for additional slaughter a few days after the first massacre. The relevant arguments had already been briefed and decided previously, and Fireman's Fund's Motion for Summary Judgment was merely a formality leading to the inevitable dismissal. . . . After the trial court's decision with respect to Lawyers Title, any response to Fireman's Fund would have been futile.

(Memorandum in Opposition to Fireman's Fund's Motion for Summary Disposition, p. 14.)

As set forth above, the trial court expressly advised the parties that Fireman's Fund and Big Sky would have the issues between them heard on the merits at a later date. (R. 720, p. 25-26.) That date arrived when Fireman's Fund filed its Motion for Summary Judgment. Big Sky had an opportunity to oppose Fireman's Fund's Motion, but failed to do so. This decision by Big Sky was shortsighted, as Big Sky was required to oppose Fireman's Fund's Motion in order to preserve any issues for appeal. In Busch Corp. v. State Farm Fire & Casualty Co., 743 P.2d 1217, 1219 (Utah 1987), the Utah Supreme Court stated:

For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon; we cannot merely assume that it was properly raised. The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review in the event of an appeal.

Here, Big Sky did not preserve any issues for appeal with respect to Fireman's Fund. The record is devoid of any pleading or argument made by Big Sky to the trial court in opposing Fireman's Fund's Motion for Summary Judgment. Nevertheless, Big Sky would ask this Court to find that its failure to oppose Fireman's Fund's Motion be of no consequence, and that the Court rely on inferences and assumptions in finding that it preserved issues for appeal against Fireman's Fund. As demonstrated above, Utah law does not share Big Sky's relaxed view of a party's duty to preserve issues for appeal.

Big Sky has the burden of showing that the issues raised on appeal were timely presented to the trial court. Big Sky's decision not to oppose Fireman's Fund's Motion for Summary Judgment and preserve issues for appeal was not, as Big Sky suggests, a "mere technicality." (Memorandum in Opposition to Fireman's Fund's Motion for Summary Disposition, p. 15.) Rather, it was a substantial miscalculation that precludes Big Sky from pursuing this appeal against Fireman's Fund.²

² Big Sky's suggestion that it did not oppose Fireman's Fund's Motion due to concerns for "judicial economy" is nothing more than a post hoc rationalization that in no way excuses its failure to preserve issues for appeal. (Appellant's Memorandum in Opposition to Fireman's Fund's Motion for Summary Disposition, p. 13.)

II. THE TRIAL COURT CORRECTLY DETERMINED THAT BIG SKY'S AMENDED COMPLAINT ASSERTED A SINGLE CLAIM FOR FRAUDULENT NONDISCLOSURE AGAINST FIREMAN'S FUND.

Big Sky argues on appeal that the trial court erred in determining that its Amended Complaint alleged only a single claim for fraudulent nondisclosure against Fireman's Fund. Again, this issue was not raised by Big Sky when Fireman's Fund moved for summary judgment. Nonetheless, Big Sky argues that the trial court erred when, in determining Lawyer's Title's Motion for Summary Judgment, it gave no regard to other language or "reasonable inferences therefrom," which Big Sky claims sufficiently sets forth additional causes of action. (Appellant's Brief, p. 33.)

Out of the seven (7) separately identified causes of action set forth in its Amended Complaint, Big Sky's Sixth Cause of Action is the only cause of action directed at Fireman's Fund. (R. 174-82.) Big Sky's Sixth Cause of Action alleges the following:

44. Defendant Lawyers Title and *Fireman's Fund* knew that Defendant *Fireman's Fund's* agent, Defendant TitlePac, had issued a professional liability insurance policy to Defendant Avis and Archibald that was in force at the time of Plaintiff's claim.

45. Defendants Lawyers Title, *Fireman's Fund*, and TitlePac have fraudulently attempted to conceal from Plaintiff that a professional liability insurance policy exists for Defendant Avis and Archibald to cover Plaintiff's claim, which fraud has damaged Plaintiff in an amount to be established upon proof at the time of trial.

46. Plaintiff is a third party beneficiary under any and all policies of insurance issued by Lawyers Title, *Fireman's Fund* and TitlePac, and that these parties are contractually liable for their insurance liabilities.

(R. 180-81.)³ The trial court determined that Big Sky's Sixth Cause of Action against Fireman's Fund was one for fraudulent nondisclosure. On appeal, however, Big Sky argues that in addition to fraudulent nondisclosure, its Amended Complaint can be read to include other "[p]ossible causes of action," including "vicarious liability for *inter alia*, Avis and Archibald's negligence, including common law and statutory causes of action." (Appellant's Brief, p. 33.)

Rule 8 of the Utah Rules of Civil Procedure provides that "[a] pleading which sets forth a claim for relief, . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief" Utah R. Civ. P. 8(a). Importantly, Rule 8 also provides that "[e]ach averment of a pleading shall be simple, concise, and direct." Utah R. Civ. P. 8(e)(1).

In this case, Big Sky's argument that the trial court erred by not inferring numerous additional causes of action into its singular, "Sixth Cause of Action," is clearly without merit. While Rule 8 requires that a party be "simple" and "concise," it also requires that a party be "direct" in its pleadings. See Utah R. Civ. P. 8(e)(1). Nothing in Big Sky's Amended Complaint is "direct" in alleging any cause of action other than

³ Big Sky also argues that additional causes of action can be inferred from its prayer for relief, which states: "Fireman's . . . is liable for damages incurred by their insured and that they committed fraud upon Plaintiff in relation to the denial of Plaintiff's claim for damages in relation to the escrowed funds and the unwillingness to produce a policy or policy number for such insurance." (Appellant's Brief, p. 33) (citing R. 174-84.)

fraudulent nondisclosure. Simply put, Big Sky's Amended Complaint cannot be fairly read to allege any cause of action other than fraudulent nondisclosure.

In its brief, Big Sky quotes from Blackham v. Snelgrove, 280 P.2d 453 (Utah 1955), stating that "a complaint is required only to ' * * * give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'" (Appellant's Brief, p. 32.) While Fireman's Fund does not disagree that this is a correct statement of the law, Fireman's Fund does not agree that Big Sky's Amended Complaint satisfies this most basic requirement. To read Big Sky's Amended Complaint as alleging anything other than a claim for fraudulent nondisclosure would require not only a healthy imagination, but also a fair amount of creativity. Clearly, the trial court cannot be faulted for reading Big Sky's Amended Complaint in accordance with its plain language.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING BIG SKY'S MOTION FOR LEAVE TO AMEND.

It is well understood that a trial court's ruling on a motion to amend a complaint will not be disturbed absent a clear abuse of discretion. See Neztsosie v. Meyer, 883 P.2d 920, 922 (Utah 1994) ("We will not disturb a trial court's ruling on a motion to amend a complaint absent a clear abuse of discretion."); Stratford v. Morgan, 689 P.2d 360, 365 (Utah 1984) (indicating that the decision to allow leave to amend is discretionary with the trial court.) Furthermore, the general rule concerning abuse of

discretion is that the reviewing court will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary. See Goddard v. Hickman, 685 P.2d 530, 534-35 (Utah 1984).

While not exhaustive, Utah courts have typically focused on the following three factors when deciding whether to grant a motion to amend: (1) the timeliness of the motion; (2) the justification given by the movant for the delay; and (3) the resulting prejudice to the responding party. See Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1216 (Utah Ct. App. 1989), rev'd on other grounds by 830 P.2d 252 (Utah 1992). In this case, it was the trial court's consideration of these factors that caused it to deny Big Sky's Motion for Leave to Amend.⁴

During the hearing on Big Sky's Motion for Leave to Amend, the trial court noted that nothing prevented Big Sky from asserting its claims "against the insurance companies from the get-go." (R. 720, p. 23.) The trial court further noted that it was only after Avis and Archibald went out of business that Big Sky turned its attention to the insurance companies. With respect to the passage of time and the statute of limitations, the trial court stated, "it would be prejudicial and unfair to the defendants to have to defend on a claim that could have come right out of the chute, and now they would be faced with something that would be time barred by the statute of limitations. That's about

⁴ Lawyer's Title filed a memorandum opposing Big Sky's Motion for Leave to Amend, and Fireman's Fund formally joined in the same. (R. 384; R. 411, respectively.)

as prejudicial as I think that you can get.” (R. 720, p. 24.)⁵

In its brief, Big Sky suggests that the trial court denied its Motion for Leave to Amend simply because it believed that such a motion was an inappropriate response to a motion for summary judgment. (See Appellant’s Brief, p. 23.) This is not true. While the trial court did question the propriety of Big Sky responding to a motion for summary judgment by seeking leave to amend, the trial court nevertheless gave due consideration to Big Sky’s Motion. The trial court considered Big Sky’s Motion for Leave to Amend, but rightly decided, based on considerations of timeliness, justification and prejudice, to deny the Motion.

The acts giving rise to this lawsuit occurred over eight years ago. Almost four years ago, the trial court granted Big Sky’s first Motion for Leave to Amend so that it could assert claims against Lawyer’s Title and Fireman’s Fund. Almost a year later, and after Lawyer’s Title had moved for summary judgment, Big Sky again sought leave to amend. Clearly, under the facts of this case, the trial court did not abuse its discretion by denying Big Sky’s Motion. See Kleinert v. Kimball Elevator Company, 854 P.2d 1025 (Utah Ct. App. 1993) (upholding the trial court’s denial of plaintiff’s motion to amend

⁵ In Kelly v. Hard Money Funding, Inc., 2004 UT App 44, P38, this Court explained that another basis for a trial court to deny a motion to amend is “unreasonable neglect in terms of pleading preparation.” While not stated in those exact words, this appears to have been part of the reason the trial court denied Big Sky’s Motion to Amend. The trial court indicated that Big Sky could have asserted the claims it was seeking to add via its Second Amended Complaint from the beginning and that there was no reason justifying its failure to do so. (See R. 720, pp. 23-24.)

based on concerns that “this is a three year old case, it is an eight year old injury, and . . . if [res ipso loquitur] were to be pled [it] could well have been pled before in terms of amendment.”)

A. Utah law does not allow a party to amend a complaint to add a legally insufficient or futile claim.

Big Sky goes to great lengths to argue that the trial court abused its discretion in denying its Motion for Leave to File Second Amended Complaint. While it is clear that the trial court’s decision was correct and in no way constituted an abuse of discretion, there is yet another reason why the trial court’s decision to deny Big Sky’s Motion was correct - “[a] party may not amend a complaint to add a claim that is legally insufficient or futile.” See Smith v. Grand Canyon Expedition Co., 2003 UT 57, P33.

In its (Proposed) Second Amended Complaint, Big Sky outlines its additional claim for “insurer liability,” alleging that the insurance company defendants breached the implied covenant of good faith and fair dealing by not indemnifying it as a “third party beneficiary” to the insurance contract. Big Sky’s (Proposed) Second Amended Complaint states:

61. Plaintiff is a third party beneficiary to Defendants obligations to insure, protect, defend and indemnify Avis and Archibald, which third party benefits have not been received by Plaintiff.

62. Defendants acts as alleged above and failure to insure, protect, defend and indemnify Plaintiff, as a third party beneficiary violate the implied covenant of good faith and fair dealings [sic] requiring an award of punitive or exemplary damages.

(Underline original.)

Under Utah law, the duty of good faith and fair dealing is limited to first parties to an insurance contract, and as such, only a first party can sue for breach of that duty. See Sperry v. Sperry, 990 P.2d 381, 383 (Utah 1999.) See also Ammerman v. Farmers Ins. Exch., 430 P.2d 576, 577-78 (Utah 1967) (explaining that the duty of good faith is owed to first parties to an insurance contract, not third-party beneficiaries). This case does not involve a first-party relationship. Instead, this case involves a third-party relationship, to which Utah appellate courts have refused to extend the implied covenant of good faith and fair dealing.

In Pixton v. State Farm Mut. Auto. Ins. Co., 809 P.2d 746 (Utah Ct. App. 1991), the plaintiff argued that an insurance company which insures a tortfeasor under a liability policy has an obligation to deal fairly and in good faith with an injured third-party who has a claim against the insurance company's insured. Id. at 748. In rejecting this argument, the court found that there must be a relevant contractual relationship between the parties in order for the plaintiff to pursue such a claim. See id. at 749. The court explained:

In sum, we are persuaded that there is no duty of good faith and fair dealing imposed upon an insurer running to a third-party claimant, such as [the plaintiff], seeking to recover against the company's insured. This conclusion is consistent with the commentators and the great majority of courts in other jurisdictions that have been confronted with the issue. As one well-known commentator on insurance law noted, 'the duty to exercise due care or good faith is

owed to the insured and not to a third party.’ 14 G. Couch, Couch on Insurance § 51:136 (rev. 2d ed. 1982).

The majority of courts faced with the potential existence of a duty of good faith and fair dealing running from an insurance company to a third-party claimant seeking to recover against the company’s insured have rejected such a notion.

Id. at 749-50.

The court in Pixton concluded that the insurance company did not owe the plaintiff a duty to deal fairly and in good faith in her capacity as a third-party claimant. Accordingly, the court held that the trial court correctly dismissed the plaintiff’s claim for breach of the covenant of good faith and fair dealing as a matter of law.

A similar result was reached in Savage v. Educator’s Ins. Co., 908 P.2d 862 (Utah 1995). In that case, the Supreme Court of Utah held that the plaintiff, a third-party claimant, could not bring a claim for breach of the covenant of good faith and fair dealing because there was no privity of contract between the claimant and the insurer. The court stated, “[b]ecause [the plaintiff] has no contractual relationship with [the insurer], she has no cause of action against it for breach of the covenant of good faith and fair dealing.” Id. at 866. The court also noted that this conclusion was consistent with the great majority of courts in other jurisdictions that have confronted the issue. See id.

Under Pixton and its progeny, it is well-settled that only a first party may sue for breach of the covenant of good faith and fair dealing. See Sperry v. Sperry, 990 P.2d at 383 (stating “Utah law clearly limits the duty of good faith to first parties to insurance

contracts”).

In this case, Big Sky claims that it is a third-party beneficiary under the Fireman’s Fund policy and that Fireman’s Fund somehow breached the covenant of good faith and fair dealing by not settling its claim. (Appellant’s Brief, p. 33.) Big Sky, however, is not an insured. Big Sky is simply a third-party claimant seeking to recover damages against one of Fireman’s Fund’s insureds. Under Utah law, Big Sky cannot maintain an action against Fireman’s Fund for breach of the implied covenant. Because there is no relevant contractual relationship between Big Sky and Fireman’s Fund, Big Sky cannot make a claim against Fireman’s Fund for breach of the covenant of good faith and fair dealing. See Pixton, 809 P.2d at 749.

Because Big Sky’s “insurer liability” claim is not allowed as a matter of law, and because the other claims set forth in Big Sky’s Second Amended Complaint are not directed at Fireman’s Fund (i.e., “vicarious liability and statutory strict liability”), the issue of whether the trial court erred in denying Big Sky’s Motion for Leave to Amend is entirely moot.⁶ Simply put, with respect to Fireman’s Fund, the outcome of this case was not affected by the trial court’s decision to deny Big Sky’s Motion for Leave to Amend.

⁶ In its brief, Big Sky attempts to argue that its “insurer liability” claim encompasses more than just a claim for breach of the covenant of good faith and fair dealing. Big Sky asserts that, while never pled against Fireman’s Fund, it is entitled to relief under Utah statutory law, as well as common-law negligence. These claims have heretofore never been asserted against Fireman’s Fund and, as discussed previously, were not raised by Big Sky as part of any opposition to Fireman’s Fund’s Motion for Summary Judgment.

CONCLUSION

Based on the foregoing, Appellee Fireman's Fund Insurance Company respectfully requests that the Court affirm the judgment of the trial court, and award it the costs it has incurred in defending this appeal.

DATED this 7th day of December, 2005.

STRONG & HANNI

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2005, a true and correct copy of the foregoing **Brief of Appellee Fireman's Fund** was served by the method indicated below, to the following:

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